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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TREVOR MICHAEL RYAN-TAUBER,

Defendant and Appellant.

H046197

(Monterey County

Super. Ct. No. 18CR000107)

Defendant Trevor Michael Ryan-Tauber appeals the trial court's postjudgment order confiscating his firearms as nuisance weapons. He argues there was no evidence he used either his .22-caliber rifle or his shotgun in the commission of any offense and therefore no factual basis for the trial court to conclude that the firearms were nuisance weapons under Penal Code section 29300. Because the record before us does not support confiscation of the rifle and the shotgun, we will reverse the order and remand for a new hearing.

I. TRIAL COURT PROCEEDINGS

According to a probation report, the driver of a semi-truck reported being robbed at gunpoint while parked near a motel in Marina. The driver told a responding officer that a man (later identified as defendant) approached the driver's side window of the truck, pointed a handgun at the driver, and told him to " 'Hand over your money.' " Defendant fled on foot after the driver gave him his wallet. Items were also reported stolen from employee lockers at the motel.

Later that month, an officer approached a car occupied by three men (including defendant) parked near a middle school. As the officer approached, he noticed defendant use a jacket to cover a large object on the seat next to him. The officer told defendant to move the jacket, and defendant uncovered a 12-pack of beer. The officer asked the occupants to step out of the car. Defendant got out and started to put his hands in the pockets of his loose-fitting clothes. The officer conducted a pat search, discovered an unregistered handgun in defendant's waistband, and arrested him.

The police executed a search warrant at defendant's residence a few days after his arrest. An officer found partially shredded credit and rewards cards that belonged to the semi-truck driver in defendant's bedroom. An officer also searched a safe in the residence and seized an AK-47 assault rifle, a .22-caliber semi-automatic rifle, and ammunition. A shotgun registered to defendant was also seized from the residence.

Defendant waived preliminary hearing and was charged by information with second degree robbery (Pen. Code, § 211) including personal use of a firearm (Pen. Code, § 12022.5, subd. (a)); commercial burglary (Pen. Code, § 459); manufacturing or possessing an assault weapon for sale (Pen. Code, § 30600, subd. (a)); and possessing an assault weapon (Pen. Code, § 30605, subd. (a)). (All statutory references are to the Penal Code.) As part of a negotiated disposition, defendant pleaded no contest to second degree robbery and admitted the personal-use enhancement in exchange for a five-year prison sentence and dismissal of the remaining charges.

At sentencing, a probation officer noted that although defendant stated on a firearms disclosure form that he did not have any weapons registered to him, the "Monterey Police Department does have custody of weapons that are still registered under [defendant's] name." The court stated "what needs to happen is [defendant] needs to transfer title of that either to someone who is responsible or to a dealer who will sell them." Defendant indicated he planned to transfer them to his "grandfather who has ... a safe for that kind of stuff." The court asked if the parties had corrections to the probation

report. Defense counsel asked the court to delete a paragraph in the report describing the guns seized from the safe at defendant's residence, arguing the paragraph related solely to counts that would be dismissed. The court responded, the "firearms are staying in. This involves a firearm. And firearms that were located in his house are relevant to that. And there is an enhancement for a firearm in this matter." Defense counsel stated, "Your Honor, just to be clear, those firearms that were found in his house were not the firearms alleged to be used in the robbery." The court replied, "And some of the rounds may well have been." The court then imposed the stipulated five-year prison term and addressed other sentencing issues.

Defense counsel returned to the firearm issue near the end of the hearing, arguing that the .22-caliber rifle and the shotgun should not be deemed nuisance weapons because defendant did not use them in committing any offense. Counsel repeated the request that defendant be allowed to fill out the proper form to "transfer those over to his grandfather and not have those two destroyed," to which the court replied, "I am not going to do that." The sentencing minute order noted the Monterey Police Department retained custody of two rifles and one shotgun that were registered to defendant, and stated that defendant had "not complied with the relinquishment requirements of Penal Code section 29810."

II. DISCUSSION

Defendant's sole appellate argument is that there was no factual basis for the trial court's implicit finding that the .22-caliber rifle and the shotgun were used in the commission of the second degree robbery, and that therefore they did not meet the definition of nuisance weapons under section 29300. The People acknowledge that defendant's challenge is properly before this court as an appeal from a postjudgment order affecting defendant's substantial rights. (Citing *People v. Beck* (1994) 25 Cal.App.4th 1095, 1104 (*Beck*).) However, the People argue that defendant forfeited his appellate argument by failing to properly fill out a form disclosing all weapons registered

to him. We conclude defendant preserved the argument by unambiguously asserting it at the sentencing hearing.

Defendant's felony conviction from this case prohibits him from owning or possessing firearms. (See § 29800, subd. (a) ["Any person who has been convicted of ... a felony ... and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony"].) Any firearms defendant owned or possessed but did not use to commit the subject offense must be relinquished to a "designee" (i.e., a local law enforcement agency or "a consenting third party who is not prohibited from possessing firearms under state or federal law"). (§ 29810, subd. (a)(1), (a)(3).) The designee then has three options: "surrender the firearms to the control of a local law enforcement agency, sell the firearms to a licensed firearms dealer, or transfer the firearms for storage to a firearms dealer." (§ 29810, subd. (a)(3).) But different rules apply to firearms "used in the commission of ... any felony." (§ 29300, subd. (a).) A firearm used in the commission of a felony is deemed a nuisance and is subject to disposal. (*Ibid.*)

Implicit in the trial court's denial of defendant's request to relinquish the rifle and shotgun to a third party is a factual finding that they were used in the commission of the robbery. We review a trial court's factual findings, express or implied, for substantial evidence. (*People v. Mickey* (1991) 54 Cal.3d 612, 649.)

The appellate court in *Beck*, *supra*, 25 Cal.App.4th 1095 discussed the process for deeming firearms nuisance weapons. Officers chasing a suspect on foot noticed marijuana plants growing in Beck's back yard. Beck was arrested for cultivating marijuana, and in executing a search warrant officers seized several firearms from his residence. The trial court denied Beck's motion for return of the firearms following his negotiated plea, reasoning that the firearms were nuisance weapons because they had been used in the cultivation offense. (*Beck*, at pp. 1098–1099.) Reversing the trial court, the *Beck* court concluded that confiscating firearms as nuisance weapons is "dependent

upon some manner of determining that the guns *were* ‘used in the commission of’ a crime.” (*Id.* at p. 1101.) A trial court must therefore have a factual basis for finding that the firearms were actually used. “If the charges necessarily involve use of a firearm in their commission, or if the defendant expressly admits the use of a firearm ... , then the factual predicate that the firearm was ‘used in the commission of’ the crime will be properly established.” (*Id.* at pp. 1101–1102.) Otherwise, in order to satisfy due process requirements a trial court must hold a “hearing, proceeding or other forum in which the determination can be made that a weapon was in fact ‘used in the commission of’ an underlying crime.” (*Id.* at p. 1103.)

Here, the trial court’s stated reasons for declaring *all* of defendant’s firearms nuisance weapons were that defendant admitted the personal-use enhancement, and that some of the ammunition seized at his residence may have been used in the robbery. But defendant admitted only that he was armed with “a” firearm, not that he was armed with multiple firearms including a rifle and a shotgun. No witness described defendant using a rifle. The record contains no factual basis for the conclusion that either long gun was used in the commission of the robbery. As for the possibility that ammunition seized from defendant’s residence was used in the crime, that finding would support confiscation of the ammunition, not of the otherwise legal firearms seized with it.

Our opinion should not be interpreted as foreclosing the conclusion that the .22-caliber rifle and the shotgun were in fact used in the robbery after further factual development. But this record lacks substantial evidence to support the trial court’s implicit factual finding that they were used. If, after a hearing, the trial court finds that the rifle and the shotgun were not used in the robbery, the court must give defendant the opportunity to relinquish the firearms under section 29810. We do not reach the parties’ arguments about the viability of defendant’s stated plan to relinquish the guns to his grandfather; the trial court will be in a better position to determine compliance with section 29810 requirements, if applicable.

III. DISPOSITION

The postjudgment order disposing of the .22-caliber rifle and the shotgun is reversed and the matter is remanded for a hearing to determine whether they are nuisance weapons under Penal Code section 29300.

Grover, J.

WE CONCUR:

Mihara, Acting P. J.

Danner, J.